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Supreme Court of the United States

OCTOBER TERM, A. D. 1948.

No. 522.

JULIUS RANNY RAGAN, PETITIONER,

VS.

MERCHANTS TRANSFER AND WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

PETITION FOR REHEARING.

DANIEL L. BRENNER,
CORNELIUS ROACH,
Counsel for Appellee.

WILFRED WIMMELL,
MACK HENCY,
ROACH, BRENNER & WIMMELL,
All of Kansas City, Missouri,
Of Counsel.

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MERCHANTS TRANSFER AND WAREHOUSE COMPANY, INC., A CORPORATION, RESPONDENT.

PETITION FOR REHEARING.

Comes now Julius Ranny Ragan, petitioner herein, and prays the Court to grant a rehearing in this cause, and as grounds for said petition states as follows:

I.

The Court has inadvertently overlooked the fact that Petitioner's mode of commencing his action neither abridged, enlarged, nor modified the substantive rights of any litigant.

II.

The Court has inadvertently failed to make an independent review of the Kansas decisions concerning Section 60-308, Kansas General Statutes, 1935.

Wherefore, appellee prays the Court for a rehearing in said cause.

Respectfully submitted,

DANIEL L. BRENNER,
CORNELIUS ROACH,
Counsel for Appellee.

WILFRED WIMMELL,
MACK HENCY,
ROACH, BRENNER & WIMMELL,
All of Kansas City, Missouri,
Of Counsel.

STATEMENT OF THE CASE.

Petitioner had judgment in the United States District Court for Kansas on his suit for injuries received in an automobile accident (R. 32). The accident occurred on October 1, 1943, and suit was instituted on September 4, 1945 (R. 1-4). Summons was served on defendant on December 28, 1945 (R. 6-7).

The Court of Appeals for the Tenth Circuit reversed the lower court's decision on the ground that suit was barred by the two year Kansas statute of limitations (180 F.2d 987).

This Court granted certiorari because of the importance of the question presented. By its opinion of June 20, 1949, this Court affirmed the Court of Appeals decision.

ARGUMENT.

I.

The Court Has Inadvertently Overlooked the Fact That Petitioner's Mode of Commencing His Action Neither Abridged, Enlarged nor Modified the Substantive Rights of Any Litigant.

Petitioner feels that the opinion of this Court failed to dispose of the merits of his case. As plaintiff in the District Court for Kansas, he instituted his action in the manner expressly provided by Rules 3 and 4 (a) of the Federal Rules of Civil Procedure (28 U. S. C. A. foll. *Sec.* 723c, R. 47). His compliance with these rules preceded the bar of the Kansas Statute of Limitations applicable to his action (*Sec.* 60-306, Kan. Gen. Stat., 1935). In addition, the Court of Appeals for the Tenth Circuit had theretofore held, in a precisely similar fact situation, that compliance with the Federal Rules in a diversity case was sufficient to toll a state statute of limitations, even though it would not have been sufficient had the action been brought in the courts of the state where the Federal court was sitting. *Isaacks v. Jeffers*, 144 F. 2d 26 (C. C. A. 10, 1944), certiorari denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624. Yet Petitioner now finds his cause of action barred because he accepted the law relative to commencement of actions as written by Congress and interpreted by his own, and other, Circuit Courts of Appeals.

The purpose of the Federal Rules of Civil Procedure was to provide a single method of procedure for all of the District Courts, in diversity cases as well as otherwise. The reason for the Rules was the intense dissatisfaction

with the Conformity Act (28 U. S. C. A., *Sec.* 724). But insofar as Petitioner is concerned, the Conformity Act was applied and enforced.

After the enactment of the Federal Rules, the courts indicated in the strongest possible language that the Federal Rules were to be followed in all cases in the Federal courts. The attitude was well summarized by the Tenth Circuit Court of Appeals in *Alley* v. *Federal National Bank of Shawnee*, 124 F. 2d 995, 998, where the court said:

> "If there is a conflict between the procedure provided for in the statute for the enforcement of the right created thereby and that provided for in the New Rules of Civil Procedure, the former must yield to the latter, because the Congressional authority under which the new rules were adopted expressly provides that after they become effective any laws in conflict therewith are of no further force and effect. The new rules have the force and effect of statutes. *Sibbach* v. *Wilson & Co.*, 312 U. S. 1, 61 S. Ct. 422, 427, 85 L. Ed. 479."

There can be no doubt that Petitioner's case presents a situation where the state statute and the Federal Rules are in conflict. And because of the position that the Federal Rules occupy, the state statute must give way.

The only possible justification for the decision is, then, a square finding that the effect of following the Federal Rules was to abridge, enlarge or modify the substantive rights of one of the parties to the action.

Rules 3 and 4 (a) of the Federal Rules prescribe when and how actions are commenced in Federal courts. And it is beyond denial that these rules control in diversity cases so long as they do not modify the substantive rights of litigants. Unless that is the effect, the policy of *Guaranty Trust Co. v. York*, 326 U. S. 99, 65 S. Ct. 1464, 89 L. Ed. 2079, is not violated or infringed upon.

Where and how is the violation of substantive rights of a litigant to be found? It cannot be found in the bare fact that plaintiff, though complying with the Federal Rules as to commencement of actions, did not meet all the requirements of the state in which the court was sitting prior to the expiration of the state statutory period for bringing suit. Two Circuit Court of Appeals cases, in which the Supreme Court denied certiorari, quite clearly and squarely held otherwise. One of those was *Bomar* v. *Keyes*, 162 F. 2d 136. This the Supreme Court would distinguish on the grounds that the suit was to enforce rights under a federal statute. The other is *Isaacks* v. *Jeffers*, 144 F. 2d 26, certiorari denied 323 U. S. 781, 65 S. Ct. 270, 89 L. Ed. 624. That case involved the exact question here presented. It reviewed the decisions, both state and Federal, bearing on this question. That review of cases demonstrates that *never*, prior to Petitioner's case, had a court held that the mode of commencing an action was, for any purpose, substantive law. Nor had any court heretofore thought that such a statute abridged, enlarged or modified the substantive rights of a litigant.

In that case an action was commenced in the United States District Court for the District of New Mexico. The basis of the court's jurisdiction was diversity of citizenship. Defendant entered a plea of the statute of limitations, charging correctly that, under New Mexico law, the action was not commenced within the period of the New Mexico statute of limitations. It was admitted that the Federal Rules as to commencement of actions had been complied with prior to the bar of the state statute of limitations. It was held, l. c. 28:

> "The law of New Mexico controls as to the time within which an action must be commenced. However, the manner in which actions are commenced, when actions are deemed to have begun, the manner

and method of serving process, all relate to procedure and are governed by the law of the forum in which the action is instituted. * * *. * * * we must now look to Rules 3 and 4 to determine when the action was commenced. * * *. Under those rules we think the action was commenced and the running of the statute interrupted by the filing of the complaint, although the process was not actually served until slightly more than sixty days after the expiration of four years from the accrual of the action."

That case represents a square holding on identical facts. And it has the tacit approval of this Court by virtue of its denial of certiorari. It is quite true that statutes of limitations are substantive rights. But the method of tolling those statutes is, and has always been held to be, a matter of procedure. Statutes as to commencement of actions do not, and cannot, abridge, enlarge or modify substantive rights.

Petitioner represents to this Court that it has inadvertently overlooked the fact that the substantive rights of the defendant in this case were not impaired.

II.

The Court Has Inadvertently Failed to Make an Independent Review of the Kansas Decisions Concerning Section 60-308, Kansas General Statutes, 1935.

As heretofore pointed out, there is nothing in the mode of commencing Petitioner's action which impairs the substantive rights of a litigant. However, this court indicated that it would accept the opinion of the Court of Appeals that the Kansas statute was actually an integral part of the Kansas Statute of Limitations.

In view of the nature of the question presented, Petitioner feels that unless this court independently reviews

the Kansas decisions relative to the statute in question, he has been deprived of his review as effectively as if certiorari had not been granted.

It is Petitioner's belief that the entire matter presented must turn upon that Kansas statute. As previously noted, the mode of commencing an action is procedural. Unless the Kansas statute is classed as a part of the statute of limitations, rather than a statute dealing with commencement of actions, there is no violation of the principle of the *Guaranty Trust* case, *supra*.

This Court, however, accepted the determination of the Court of Appeals, citing *Huddleston* v. *Dwyer*, 322 U. S. 232, 237.

The pertinent portion of the *Huddleston* opinion is as follows, 323 U. S. 232, 237:

> "The decisions of the highest court of a state on matters of state law are in general conclusive upon us, and ordinarily we accept and therefore do not review, *save in exceptional cases*, the considered determination of questions of state law by the intermediate federal courts" (Italics added).

If ever there was an exceptional case calling for this Court's independent review of the local law, certainly Petitioner's case is such. The very crux of the case is a question of local law. The only basis for the application of the *Guaranty Trust* case, *supra*, is the original finding that Section 60-308 of the Kansas Statutes is an integral part of the Kansas Statute of Limitations. And the case presented on certiorari cannot be decided without a consideration and application of the decisions of the Kansas courts.

If the disputed section of the Kansas statuties is actually a part of the statute of limitations, then it is elemen-

tary that it could have no application to questions other than those involving the statute of limitations.

In *Bainister v. Carroll*, 43 Kan. 64, 22 Pac. 1012, the Kansas Supreme Court authoritatively indicated that the section had application to commencement of actions for all purposes. The court there said that the section had to be complied with for all purposes; that where the question was that of tolling the statute of limitations it was not until the date of compliance with Section 60-308, the disputed section, but where the propriety of attachment was concerned:

> "We think the proper construction * * * is that when a petition is filed and a summons served, or its first publication is made within 60 days such service or first publication relates back to the time of filing of the petition and praecipe and other necessary papers, and by such relation the suit is to be deemed commenced at the date of their filing." Accord: *Vann v. Missouri, K. and T. R. Co.*, 110 Kan. 799, 205 Pac. 607; *Allis-Chalmers Mfg. Co. v. Lewelling*, 141 Kan. 350, 41 Pac. 2d 1032.

Since the section must be complied with in all instances and for all purposes, it is quite clear that it is not a detached segment of the statute of limitations, but is purely a procedural statute designating the mode of commencing an action in the state courts of Kansas. Being procedural, it represents no part of the cause of action, and has no right to be applied either in the courts of another state or in the Federal courts.

An examination of the above cases, as well as those collected at pages 27-39 of Petitioner's brief on certiorari, shows that the Court of Appeals erred in its interpretation of the disputed statute. Under Kansas law, for all purposes, the person commencing the action must completely and fully comply with the provisions of that section.

Failure to comply means that, *for all purposes*, no action has been commenced. The sole difference is this: in order to allow the use of such devices as attachment, a fiction of "relation back" is used, so that attachment may issue immediately upon the filing of the petition; in computing the date that the statute of limitations is tolled, the date of compliance with the disputed statute is used.

Section 60-308 of the Kansas statutes is purely procedural. It is, insofar as it relates to the statute of limitations, merely a method of promoting due diligence and requiring good faith in order that the statute be tolled. The Kansas statute is not an integral part of the statute of limitations and the Kansas Supreme Court has never so held.

The case presented to this Court cannot be decided without a thorough review of the Kansas decisions and a square answer of the question: Is this Kansas statute more than a statute as to commencement of actions, is it in fact a detached segment of the statute of limitations of the state of Kansas? This question was not passed upon by this Court. The facts of the instant case certainly make it one of the "exceptional cases" referred to in *Huddleston* v. *Dwyer, supra*. A rehearing should be granted for the purpose of an independent review of the Kansas law relative to Section 60-308, Kan. Gen. Stat., 1935.

Respectfully submitted,

DANIEL L. BRENNER,
CORNELIUS ROACH,
Counsel for Appellee.

WILFRED WIMMELL,
MACK HENCY,
ROACH, BRENNER & WIMMELL,
All of Kansas City, Missouri,
Of Counsel.